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GLC PROPERTIES (M) SDN BHD

v.

POLY RESOURCES SDN BHD

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HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL APPEAL NO: 1-12-49-2003]
24 FEBRUARY 2006

C ***CIVIL PROCEDURE:*** *Res judicata - Principles - Similar issues raised in a previous application - Issue in question must have been determined finally and conclusively - Subordinate Courts Rules 1980, O. 26A, O. 28 r. 9 - Rules of the High Court 1980, O. 33 r. 2*

D The plaintiff claimed against the defendant for the refund of an advance of RM50,000 which was paid under a realienation agreement. The defendant counterclaimed against the plaintiff a sum of RM159,680 based on a management agreement between the plaintiff and the defendant. The Sessions Court judge allowed the plaintiff's application under O. 26A of the Subordinate Courts Rules 1980 (SCR) and entered summary
E judgment for the plaintiff. The defendant did not appeal against the summary judgment. However, the defendant filed the present appeal against the decision of the learned Sessions Court judge who had allowed the plaintiff's preliminary question raised under O. 28 r. 9 of the SCR. The question was "Whether the Court has decided on the
F issues and merits of the case on the application for summary judgment which are essentially the same as the counterclaim and hence the issues raised in the counterclaim are *res judicata*?" ("the Question"). The trial judge had answered the Question in the affirmative and dismissed with costs the defendant's counterclaim.

G **Held (allowing the appeal with costs):**

(1) For the doctrine of *res judicata* to apply, the *sine qua non* is that the claim, cause of action or issue in question must have been adjudged, resolved, decided or determined finally and conclusively. (para 25)

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(2) Applying the doctrine of *res judicata*, the scope of the summary judgment entered for the plaintiff by the then trial judge was based on the plaintiff's claim which in turn was founded upon the realienation agreement. The order perfected by the parties in relation
I to the summary judgment made no reference to the determination of the counterclaim by the then trial judge. The counterclaim was based on the management agreement which was separate and

distinct from the realienation agreement. The management agreement was never within the purview and ambit of determination by the then trial judge in entering the summary judgment. (paras 29 & 30)

(3) The doctrine of *res judicata* would apply only when the issues in the realienation agreement and the management agreement are identical and only if the then trial judge had made a determination thereon, but that was not to be the case here. Hence the doctrine of *res judicata* could not be invoked at all. (para 31)

Case(s) referred to:

Arnold & Ors v. National Westminister Bank Plc [1991] AC 93 ***(refd)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Chan Yuow Seng v. Ling Ong Hua [1995] 2 MLJ 580 ***(refd)***

Chua Wee Seng v. Azal Mohamed [1971] 1 MLJ 106 ***(refd)***

Government of Malaysia v. Dato Chong Kok Lim [1973] 2 MLJ 74 ***(refd)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***

Kumarasamy Sengainy & Ors v. Revathy Development (M) Sdn Bhd [1995] 2 MLJ 486 ***(refd)***

Palaniappa Chettiar v. Sithambaram Chettiar & Ors [1982] 1 MLJ 186 ***(refd)***

Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd [1985] 1 CLJ 62; [1985] CLJ (Rep) 242 FC ***(refd)***

Perspective Management Services Sdn Bhd v. Seganom Sdn Bhd [2004] 4 CLJ 466 CA ***(refd)***

Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu [2003] 4 CLJ 337 CA ***(refd)***

Satyadhyan Ghosel & Ors v. Sint Deorajin Dobi & Anor AIR [1960] SC 941 ***(refd)***

SI Rajah & Anor v. Dato Mak Hon Kam & Ors (No 1) [1994] 1 CLJ 207 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 15 rr. 2(1), (2), (3), O. 26A, O. 28 rr. 9, 10, O. 33 r. 2

Subordinate Courts Rules 1980, O. 26A, O. 28 r. 9

For the defendant - Maslinda Muhamad; M/s J Azmi & Assocs
For the plaintiff - Venkateswra Kandasamy; M/s David Lingam & Co

Reported by Amutha Suppayah

JUDGMENT

Low Hop Bing J:

Appeal

[1] This is an appeal by the appellant-defendant ("the defendant") against the decision of the learned sessions court judge ("the present trial judge") who had on 1 October 2003 allowed the plaintiff's preliminary

question raised under O. 28 r. 9 of the Subordinate Courts Rules 1980 (O. 33 r. 2 of the Rules of the High Court 1980). The question was formulated by the plaintiff's solicitors as follows:

> Whether the Court has decided on the issues and merits of the case on the application for summary judgment which are essentially the same as the counterclaim and hence the issues raised in the counterclaim are *res judicata*? ("the Question")

[2] The present trial judge answered the question in the affirmative and dismissed with costs the defendant's counterclaim.

[3] A reference to an order and a rule in this judgment shall be a reference to that order and rule in the Subordinate Courts Rules 1980 unless otherwise stated.

Factual Background

[4] The plaintiff's claim against the defendant is for the refund of the advance of RM50,000 together with interest at 8% p.a. from 1 March 1997 to the date of realisation, and costs, *vide* an agreement dated 13 November 1996 ("the realienation agreement"). Pursuant to the realienation agreement, at a total consideration of RM100,000, the defendant was to obtain for the plaintiff within 30 days of the date of execution thereof an approval for the surrender and realienation of the land held under Lot No. 165, Registration No. 3778 in the mukim of Durian Tunggal, district of Alor Gajah ("the land").

[5] The statement of defence pleaded that the realienation agreement was entered into by one Mohd Zainurin bin Ithnin, who was the defendant's managing director and that the defendant had not defaulted in the realiention agreement.

[6] The defendant had included in the defence a counterclaim against the plaintiff for the sum of RM159,680 representing 2% of RM7,984,000 being the proceeds of sale of the land, 8% interest from 5 February 1997 and costs, allegedly based on an agreement dated 14 January 1997 ("the management agreement") between the plaintiff and the defendant relating to the management of the land and that payment was to be effected on or before 5 February 1997.

[7] The land was allegedly sold by the registered owner General Master Sdn Bhd to the plaintiff at a consideration of RM7,984,000 on 1 November 1996.

[8] On 2 April 1999, the then sessions court judge ("the then trial judge") allowed the plaintiff's application under O. 26A, and entered summary judgment for the plaintiff ("the summary judgment").

[9] The defendant has not appealed against the summary judgment. A

[10] Several principles of immense importance pertaining to O. 28 r. 9, counterclaim and *res judicata* have been raised before me. It is therefore imperative for me to set out the relevant principles.

Trial Of Question Or Issue B

[11] Order 28 r. 9 relied on by the plaintiff merits reproduction as follows:

> **9 Time, etc of trial of questions or issues (O. 28 r. 9)** C
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> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated. D

[12] Under O. 28 r. 10, if it appears to the court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just. E

[13] As O. 28 r. 9 and O. 33 r. 2 of the Rules of the High Court 1980 contain equipollent provisions, the principles enunciated by our superior courts pursuant to O. 33 r. 2 of the Rules of the High Court 1980 would be useful and applicable. F

[14] In considering O. 33 r. 2 of the Rules of the High Court 1980 in *S.I. Rajah & Anor v. Dato Mak Hon Kam & Ors. (No. 1)* [1994] 1 CLJ 207 HC, Lim Beng Choon J (as he then was) said at p 212: G

> Order 33 r 2 RHC 1980 has a very wide scope and is applicable to questions of fact or questions partly of fact and partly of law raised by a party to the suit "before, at and after the trial" of the suit. However before deciding whether to allow the preliminary questions to be raised the Court must bear in mind the following observations: H
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> (a) As a general rule the Court will exercise its power under O. 33 r. 2 if and only if the trial of the question will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go to trial as a whole.
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> (b) An order under the said rule should not be made in respect of matters which by reason of the obscurity either of the facts or the law ought to be decided at the trial of the suit. I

(c) Preliminary points of law have been described as too often treacherous short cuts but where it is a trial of so-called issues of fact, the justification is even harder to discern.

(d) A preliminary question should be carefully and precisely framed so as to avoid difficulties of interpretation as to what is the real question which is being ordered to be tried as a preliminary issue.

The above principles were cited with approval by Mohd Noor Ahmad JCA (later FCJ) in *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu* [2003] 4 CLJ 337 CA. (See also *Palaniappa Chettiar v. Sithambaram Chettiar & Ors.* [1982] 1 MLJ 186 FC per Lee Hun Hoe CJ (Borneo) (as he then was) and *Kumarasamy a/l Sengainy & Ors v. Revathy Development (M) Sdn Bhd* [1995] 2 MLJ 586 HC per Mohd Ghazali JC (now JCA).

Counterclaim

[15] Instead of bringing a separate action, O. 15 r. 2(1) enables the defendant who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter, to make a counterclaim in respect of that matter and add the counterclaim to his defence, as has been done by the defendant herein.

[16] O. 15 r. 2(1) shall apply in relation to the counterclaim as if the counterclaim were a separate action and as if the person making the counterclaim were the plaintiff and the person against whom it is made a defendant: O. 15 r. 2(2).

[17] The procedure in the High Court is contained in O. 15 r. 2(1) of the Rules of the High Court 1980, thereby making a counterclaim a creation of statute: *Permodalan Plantations Sdn. Bhd. v. Rachuta Sdn. Bhd.* [1985] 1 CLJ 62; [1985] CLJ (Rep) 242 per Salleh Abas LP (as he then was).

[18] In considering O. 15 r. 2(1) of the Rules of High Court 1980 in *Permodalan Plantations, supra*, the then learned Lord President explained at p 161C right column that a counterclaim is a cross-claim which a defendant has against a plaintiff but in respect of which the defendant can bring a separate action against the plaintiff if he wishes to do so and that to all extent and purposes a counterclaim is a separate and independent action by the defendant which the law allows to be joined to the plaintiff's action in order to avoid multiplicity or circuity of suits.

[19] Under O. 15 r. 2(3), a counterclaim may be proceeded with notwithstanding that judgment is given for the plaintiff in the action or that the action is stayed, discontinued or dismissed.

Res Judicata

[20] The doctrine of *res judicata* is sometimes referred to as "issue estoppel". Hence, the expressions "*res judicata*" and "issue estoppel" may be used interchangeably.

[21] Authorities abound in explaining what these expressions mean. It is enlightening to embark on a discussion of some of these authorities.

[22] In *Perspective Management Services Sdn Bhd v. Seganom Sdn Bhd* [2004] 4 CLJ 466 CA, Mokhtar Sidin JCA in delivering the majority judgment of the Court of Appeal revisited this doctrine as expounded by the courts in India, England and Malaysia, where his Lordship referred to the position explained by Peh Swee Chin FCJ (as he then was) in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 SC at p 791, as follows:

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per *rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation – *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action – *memo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy.
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> Since a *res judicata* creates an estoppel *per rem judicatum*, the doctrine of *res judicata* is really the doctrine of estoppel *per rem judicatum*, the latter being described sometimes in a rather archaic way as estoppel by record. Since the two doctrines are the same, it is no longer of any practical importance to say the *res judicata* is a rule of procedure and that an estoppel per *rem judicatum* is that of evidence. Such dichotomy is apt to give rise to confusion.

[23] In *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104 CA, the Court of Appeal, through the judgment of Gopal Sri Ram JCA at p 1467, referred to the judgment of Sharma J at p 76 in *Government of Malaysia v. Dato Chong Kok Lim* [1973] 2 MLJ 74 and the judgment of the Indian Supreme Court in *Satyadhyan Ghosel and Ors. v. Sint Deorajin Dobi and Anor*, AIR 1960 SC 941 which stated the law on the subject as follows:

A The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata*, it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. When a matter – whether on a question of fact or a question of law – has been *decided* between two parties in one suit or proceeding and the decision is final, either because no appeal was B taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of *res judicata* is embodied in relation to suits in section 11 of the Code of Civil Procedure; but even where section 11 does not apply, the principle of *res judicata* has been applied by courts for the purpose of C achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.

The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a court whether the trial court or a D higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.

[24] In *Arnold and Others v. National Westminister Bank Plc* [1991] AC 93 HL, Lord Diplock at p 104 stated as follows: E

Issue estoppel may arise whether a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties F seeks to re-open that issue …

[25] The above authorities have also made it abundantly clear that for the doctrine of *res judicata* to apply, the *sine qua non* is that the claim, cause of action or issue in question must have been adjudged, resolved, decided or determined finally and conclusively.

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Scope Of Summary Judgment

[26] Learned counsel Miss Maslinda bt Muhamad submitted for the defendant that the summary judgment was entered on the basis of the realienation agreement but not the management agreement on which the H defendant was seeking to establish in the counterclaim and so the merits of the counterclaim could not have been decided upon by the then trial judge at the summary judgment stage.

[27] Plaintiff's learned counsel Mr. Venkateswara Kandasamy contended I that the question was raised for the plaintiff under O. 28 r. 9 for the trial court to decide whether the issues raised in the summary judgment and those in the counterclaim are essentially the same, adding that the issues were the same and so *res judicata* applies.

[28] The question for determination before me is whether the present trial judge is correct in arriving at his decision.

[29] Reverting to the above factual background, and applying the doctrine of *res judicata* set out above, there can be no doubt in my mind that the scope of the summary judgment entered for the plaintiff by the then trial judge was based on the plaintiff's claim which in turn was founded upon the realienation agreement.

[30] The order perfected by the parties in relation to the summary judgment made no reference to the determination of the counterclaim by the then trial judge. The true position is that the counterclaim was based on the management agreement which is indeed separate and distinct from the realienation agreement. The management agreement was never within the purview and ambit of determination by the then trial judge in entering the summary judgment.

[31] The doctrine of *res judicata* would apply only when the issues in the realienation agreement and the management agreement are identical and only if the then trial judge had made a determination thereon, but that was not to be the case here. Hence the doctrine of *res judicata* could not be invoked at all: see eg, the above authorities of the Federal Court, the Court of Appeal; and the House of Lords under the heading "*res judicata*"; *Chua Wee Seng v. Azal Mohamed* [1971] 1 MLJ 106 HC at p 107 per Sharma J (as he then was); and *Chan Yuow Seng v. Ling Ong Hua* [1995] 2 MLJ 580 at pp 584 and 585 per Abdul Malik Ishak J.

Conclusion

[32] By reason of the foregoing gounds, the present trial judge was in error when he applied the doctrine of *res judicata* and dismissed the defendant's counterclaim. I therefore allow this appeal with costs, set aside the order of the present trial judge and remit the countercclaim to him with a direction to proceed with an earlier trial of the defendant's counterclaim on its merits.